



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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Ref: 8RC

This letter discusses information claimed as confidential business information (CBI). It should be handled in accordance with appropriate CBI procedures until the later of the expiration of the period for appeal of this determination or a decision on the merits of any such appeal.

By personal delivery

Michelle DeVoe
Davis Graham & Stubbs LLP
1550 17th Street, Suite 500
Denver, CO 80202

Re: Nelson Tunnel Superfund Site, Creede, Colorado; Final Determination Concerning Confidentiality

Dear Ms. DeVoe:

Hecla Limited and CoCa Mines, Inc. (Hecla) have asserted a claim of confidentiality over documents previously submitted in response to a 2009 United States Environmental Protection Agency (EPA) information request made under section 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9604(e). The claim covers documents listed as Exhibit A in your April 13, 2015 substantiation letter ("Substantiation") [Attachment 1]. Your Substantiation grouped the documents into the following three categories:

- (1) Category 1: proprietary information, including drilling, sampling, mapping and other commercially sensitive data and analysis, related to mineral resources and their evaluation, exploration, development and production;
- (2) Category 2: minutes of corporate meetings, corporate resolutions and related documents; and,
- (3) Category 3: insurance policies and related documents.

EPA issued a CBI determination letter dated October 3 (and a follow-up letter dated October 4) regarding the Category 1 documents. [Attachment 2] This determination letter addresses the information identified as confidential for the remaining documents in Categories 2 and 3.

I have carefully considered your claim. Pursuant to my authority under 40 C.F.R. § 2.205, for the reasons stated below, I find that the Category 2 and 3 documents are not entitled to confidential treatment.

BACKGROUND

The following is a timeline of correspondence exchanged with respect to this claim:

1. March 19, 2015: EPA requested that Hecla substantiate its claim of confidentiality ("Request for Substantiation").

2. April 13, 2015: EPA received Hecla's response to EPA's request. Hecla asserted the confidentiality of all the information in Exhibit A to be maintained in perpetuity, including all Category 1 documents. Substantiation, Exhibit A.
3. August 13, 2018: EPA requested, by email, a more detailed description of Hecla's CBI claims made in the 2015 substantiation within five business days (August 20).
4. August 15, 2018: EPA received Hecla's extension request to submit the additional information and requested a response by August 27th (an additional five business days).
5. August 23, 2018: EPA counsel discussed EPA's request for additional information with counsel for Hecla, who requested a further extension of the deadline to submit the additional information. EPA granted an extension for Hecla to submit the additional information by September 4, 2018, and that Hecla used the additional time "to identify the CBI-claimed material with greater specificity, including an identification (by clearly marking the documents with redactions) of ore assay results and a discussion of their relation to substantial competitive harm."
6. September 4, 2018: EPA received Hecla's response by letter, narrowing Hecla's CBI claims. ("September 4 Letter") [Attachment 3]. In its September 4 Letter Hecla released its CBI claim over most of Category 1, except for a few documents.

Hecla continues to claim that the documents in Categories 2 and 3 are confidential. September 4 Letter at 2.

DISCUSSION

Scope of Freedom of Information Act (FOIA) exemption 4

In the context of Freedom of Information Act (FOIA) requests, Exemption 4 includes Confidential Business Information, or CBI, and cases interpreting CBI in the context of Exemption 4 are relevant to the determination. Exemption 4 of the FOIA covers "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4). For information to meet the requirements of this exemption, the EPA must find that the information is either (1) a trade secret; or (2) commercial or financial information obtained from a person and privileged or confidential (commonly referred to as CBI). The definition of "trade secret" under the FOIA is limited to "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). You have neither identified nor definitively claimed that the information is a trade secret, nor explained how the Agency's release of this information would identify a plan, formula, process, or device. *See* Substantiation at 6. Therefore, I find that the information is not a trade secret. The remainder of this determination discusses whether the information is CBI.

CBI: Initial Considerations

Threshold requirements: commerciality, "from a person"

Though not a trade secret, information may still be exempt from release under the FOIA if it is CBI: "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The terms "commercial" or "financial," for purposes of FOIA Exemption 4, "should be given their ordinary meanings." *Pub. Citizen*, 704 F.2d at 1290 (citing *Washington Post Co. v. HHS*, 690 F.2d 252, 266 (D.C. Cir. 1982)). Here, the information at issue relates to a business, thereby meeting the

ordinary definition of "commercial." Since Hecla meets the definition of the term "person," as defined by EPA regulations at 40 C.F.R. § 2.201(a), the information was "obtained from a person" as required by Exemption 4 of the FOIA.

Criteria for evaluating confidentiality of business information

EPA's regulations state that for business information to be entitled to confidential treatment the Agency must have determined that, *inter alia*:

- (1) The business has asserted a claim of confidentiality and that claim has not expired, been waived, or been withdrawn;
- (2) The business has shown that it has taken reasonable measures to protect the confidentiality of the information, and that it intends to continue to take such measures;
- (3) The information is not, and has not been, reasonably obtainable by a third party through legitimate means without the business's consent; and
- (4) No statute specifically requires disclosure of the information.

40 C.F.R. § 2.208. Hecla has described its assertions of confidentiality for all documents described in Exhibit A, its efforts to prevent disclosure, and the public unavailability of the documents. Substantiation at 1-3. As described further below, however, EPA does not agree that all the documents meet the third criteria.¹ I have found no information as to any statute specifically requiring disclosure of the information at issue here. Therefore, I find that the four criteria above have been satisfied for each of the three groups of documents at issue here.

The remainder of the confidentiality analysis involves criteria that differ depending on whether the information was voluntarily submitted to the agency. Information submitted to the Government on a voluntary basis "is 'confidential' for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc), cert. denied, 507 U.S. 984 (1993). On the other hand, information that was required to be submitted to the Government is confidential if its "disclosure would be likely either '(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.'" *Critical Mass*, 975 F.2d at 878 (quoting *National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)) (footnote omitted).

Confidentiality Analysis: Required Submission

For a submission to be considered required, an agency must possess the authority to require submission of information to the agency and must exercise this authority. *National Parks*, 498 F.2d at 770; see also *Critical Mass*, 975 F.2d at 880. As acknowledged in your substantiation, all documents at issue here were collected under EPA's CERCLA authority. Substantiation at 5. Accordingly, because the EPA not only has the authority to require submission of the information, but also has exercised its authority, Hecla's submission of the information was required, and this determination will apply the confidentiality criteria pertinent to required submissions.

As discussed above, the test for confidentiality of commercial or financial information that is required to be submitted to the government is governed by *National Parks*, 498 F.2d at 770. Under the *National*

¹ See discussion *infra* Category 2.

Parks test, a required submission is “confidential” if “disclosure of the information is likely to have either of the following effects: (1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.” *Id.* at 770 (footnote omitted).

Required submission, first confidentiality element: Impairment

In addressing impairment to the Government’s ability to obtain necessary information that is required to be submitted in the future, the inquiry focuses on the likelihood that the Government will receive accurate information from the submitter. In other words, “[i]f the government can enforce the disclosure obligation, and if the resultant disclosure is likely to be accurate, that may be sufficient to prevent any impairment.” *Washington Post Co. v. U.S. Dep’t of Health and Human Servs.*, 690 F.2d 252, 268 (D.C. Cir. 1982). Here, the information was obtained under EPA’s CERCLA information gathering authority. 42 U.S.C. § 9604(e).

EPA has an enforcement mechanism to ensure that recipients do not disregard CERCLA information requests, and I find no reason to believe that disclosure of the information in this matter would itself lead to noncompliance. Therefore, reviewing the first part of the *National Parks* confidentiality standard, I find no basis to conclude that disclosure of any of this information would impair the government’s ability to use its authority to obtain information in the future. The confidentiality analysis therefore turns to the question of competitive harm.

Required submission, second confidentiality element: Competitive harm

Information that was required to be submitted is confidential if its disclosure would be “likely to cause substantial harm to the business’s competitive position.” 40 C.F.R. § 2.208(e)(1); *National Parks*, 498 F.2d at 770. To meet the competitive harm test, it is not enough to show that the release of the information would likely cause *any* potential for competitive harm. Rather, Hecla must demonstrate both actual harm and a likelihood of substantial competitive harm. *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 977 (1988). As set forth in the Request for Substantiation, to support a claim for confidential treatment, Hecla must discuss with specificity why release of the information is likely to cause substantial harm to its competitive position. Further, Hecla must explain the nature of these harmful effects, why they should be viewed as substantial, and the causal relationship between disclosure and such harmful effects. In addition, Hecla must explain how its competitors could make use of this information to your detriment. For the reasons stated below, EPA has determined that release of the documents in Categories 2 and 3 are not “confidential,” and is thus subject to disclosure. A more detailed description of the documents is included in Attachment 4.

Category 2 Documents

In its Substantiation, Hecla asserts that the documents in Category 2:

contain the opinion and analysis of the Companies’ management regarding the investment in, and operation of, various mineral development projects, candid discussions regarding the overall management of the Companies, and management’s opinion on sensitive financial, personnel and similar matters. This information is similar to the information in Category 1,² and may harm the

² According to Hecla, release of the documents in Category 1 would cause substantial harm to its competitive position because it includes information that:

allows the Companies to evaluate the economic feasibility of developing a particular mineral

Companies' competitive positions for similar reasons. Release of this information would also provide the Companies' competitors with unique analysis and opinion regarding the overall financial status of the Companies, as well as the Companies' confidential strategies for investment and growth.

Substantiation at 4; *see also* September Letter at 2.

The documents date from the 1970s to the 1990s, and include several articles of incorporation; articles of merger and other merger-related documents between Mineral Engineering Company's ("MECO") and CoCa Mining; meeting minutes of MECO's board of directors; and correspondence related to exploration efforts in the Creede mining area, including MECO's efforts to secure a joint venture partnership with Homestake Mining³ in the Creede mining area. *See* Attachment 3.

First, documents such as the articles of incorporation and merger-related documents are not confidential because they have been disclosed to a third party or are "reasonably obtainable by a third party." 40 C.F.R. § 2.208; *see, e.g.*, Hecla 104(e) 2487-2486 (articles of incorporation for CoCa Mines); Hecla 104(e) 2497-2506 (articles of merger between CoCa Mines and Hecla). The Colorado Department of State has even stamped the documents to reflect its receipt of them. *See Anderson v. HHS*, 907 F.2d 936, 952 (10th Cir. 1990) (declaring that "no meritorious claim of confidentiality" can be made for documents that are in the public domain); *Starr O'Toole Marcus & Fisher v. United States*, 2008 U.S. Dist. LEXIS 52273, at *1 (D. Haw. July 7, 2008) (noting articles of incorporation are not confidential in nature).

As for the remaining documents in Category 2, which include the meeting minutes of the board of directors and correspondence that describes Hecla's exploration efforts in the Creede area, I find that Hecla has not adequately demonstrated why disclosure of the documents would result in substantial competitive harm. *Public Citizen Health Research Group v. Food & Drug Administration*, 185 F.3d 898, 906 (D.C. Cir. 1999) (stating that conclusory and generalized assertions of substantial competitive harm are insufficient). For reasons similar to my finding regarding the Category 1 documents, disclosure of these documents would not provide competitors with "valuable insights into the company's operations, give competitors pricing advantages over the company, or unfairly advantage competitors in future business negotiations." *People for the Ethical Treatment of Animals v. United States Dep't of Agric.*, 2005 U.S. Dist. LEXIS 10586, at *19-20 (D.D.C. May 24, 2005) (citations omitted). For further explanation, please see EPA's determination regarding the Category 1 documents. Attachment 2.

The age of the documents also undermines any claim to confidentiality. Hecla's asserts that the documents reflect "management's opinion on sensitive financial, personnel and similar matters."

deposit. Even where the development of a property is not immediately feasible from an economic standpoint, or is unlikely for other reasons, this information remains valuable.... Data from one site may lead to insight with respect to unrelated properties, and exploratory techniques developed in the course of evaluating the mineral resources in one location may be applied at others.

Substantiation at 4.

³ It is unclear whether CoCa formed a joint venture with Homestake, but the documents at issue suggest that CoCa Mining (previously MECO) at least made efforts to enter into one with Homestake. *See e.g.*, Hecla 104(e) 03600 (Hecla's CBI claim for this document was withdrawn in its September 4 Letter at 2); U.S. Geological Survey, "Mineral Resource Data System: Creede Formation," available at https://mrdata.usgs.gov/mrds/show-mrds.php?dep_id=10118250.

Substantiation at 4. However, the financial and personnel cost estimates that inform the economic feasibility of developing a particular mineral deposit are dated by almost three decades. With technological developments and an increase in knowledge of the Creede district by the industry as a whole as described in EPA's Category 1 determination, Hecla has not demonstrated how such dated financial and personnel information would benefit potential competitors. Information submitted to EPA can become stale over time, as the passage of time often erodes the likelihood of competitive harm. Age of documents is a factor to consider in determining whether disclosure is likely to cause competitive harm. *In re Agent Orange Product Liability Litigation*, 104 F.R.D. 559, 575 (E.D.N.Y. 1985) (citing, e.g., case holding information "stale and not entitled to protection" after three to fifteen years); *Ctr. for Pub. Integrity v. DOE*, 191 F. Supp. 2d. 187, 195 (D.D.C. 2002) ("Courts have recognized that the passage of time can mitigate the potential for harm that might otherwise have resulted from the release of commercial information"). I find that the documents in Category 2 are stale for purposes of demonstrating any potential competitive harm.⁴

Therefore, I find that Hecla has failed to establish that competitive harm could result from disclosure of the documents in Category 2.

Category 3 Documents

Hecla asserts that competitive harm could result from the disclosure of the Category 3 documents because it would "provid[e] an incentive to third parties to assert legal claims against the Companies" and "would also provide, outside a litigation context and without the protections afforded in a formal discovery process, information on the Companies' financial resources and potential abilities to fund a judgment." Substantiation at 5; *see also* September 4 Letter at 2.

The Category 3 documents include various insurance (automobile, umbrella, general liability, multi-peril) policies related to Hecla's mining operations for policy periods that range from 1976 to 1990, and correspondence between insurers and Hecla. The correspondence includes details on the premium breakdown and deadlines for payment, endorsements to existing policies, requests for renewal or termination of policies, surety bonds, and sworn statements of loss claims from another mining company.

Hecla's suggestion that competitors would use the insurance-related documents to bring claims that would harm its competitiveness not only fails to demonstrate why actual harm to its competition (within

⁴ Hecla also asserts that Category 2 "also contains information which may result in an unwarranted invasion of privacy for corporate directors, officers and employees as to compensation, performance and other matters, if it is released to the public." Substantiation at 4. Such a privacy concern is generally addressed under FOIA exemption 6. While Hecla did not identify the records as to which it raises this concern, in EPA's assessment there is a limited subset of the merger documents that Hecla submitted to the U.S. Securities and Exchange Commission where potential privacy interests could conceivably be implicated. These include Hecla 104(e) 2630-31 (noting pay increased to a named individual), Hecla 104(e) 2786 (identifying the pension amount accrued during 1989 and the amount to be distributed to named board members), Hecla 104(e) 2806-07 (discussing the severance payment plan and amount for a certain named former employee), and Hecla 104(e) 2856 (citing severance compensation plans for two managers). Additionally, there is a letter of resignation from a former board member. Hecla 104(e) 23946. While EPA intends to evaluate potential privacy interests before disclosing the documents, in accordance with FOIA exemption 6 and other applicable law, such an evaluation is not pertinent to this exemption 4 confidential business information analysis.

the mining industry) would result, but is also highly speculative in that it assumes that Hecla's competitors would use the information contained in Category 3 to obtain judgments to such a degree that Hecla would suffer actual competitive harm. *CNA Financial Corp.*, 830 F.2d at 1152, *cert. denied*, 485 U.S. 977 (1988) (finding that "substantial competitive harm" requires a demonstration of both actual harm and a likelihood of substantial competitive harm); *Lee v. FDIC*, 923 F. Supp. 451, 455 (S.D.N.Y. 1996) (rejecting competitive harm claims is appropriate when a submitter fails to provide adequate documentation of the specific, credible, and likely reasons why disclosure of the document would cause substantial competitive injury); *Brownstein Zeidman & Schomer v. Dept. of Air Force*, 781 F. Supp. 31, 33 (D.D.C. 1991) (citing *Nat'l Parks*, 498 F.2d at 680) (stating that exemption 4 does not apply where the harm that could result with the release of confidential information is only speculative).

The lengthy policy documents largely contain boilerplate language that is commonly distributed to all insured parties to explain the policies in detail. *Ainco Mich. Meadows Holdings, LLC v. Accent Cleaners*, 2007 U.S. Dist. LEXIS 53922, at *4 (S.D. Ind. July 23, 2007) (noting that "insurance policies themselves are not privileged"). Even if we were to assume that Hecla's concern is disclosure of the limitations on liability and premium information contained in the policy documents, it seems unlikely that such information would reveal Hecla's "financial resources" and "ability to fund a judgment" to an extent that would incentivize its competitors to bring claims.

Further, the Exemption 4 competitive harm analysis "is...limited to harm flowing from the affirmative use of proprietary information *by competitors*." See e.g., *Public Citizen*, 704 F.2d at 1291 n.30 (emphasis in original) (citations omitted). The limited case law that has required withholding of insurance-related documents because it would result in competitive harm has done so on the basis that the insurer would be harmed, not the insured. See *National Ass'n of Government Employees v. Campbell*, 593 F.2d 1023, (D.C. Cir. 1978) (involving competition amongst insurance companies related to innovative benefits for Federal Employees Health Benefits Act approval process); *Century Aluminum Co. v. AGCS Marine Ins. Co.*, 2012 U.S. Dist. LEXIS 113063, at *6 (N.D. Cal. Aug. 10, 2012) ("The Court agrees that competitive harm may result to [the insurance company] if [the claim file] is publicly-disseminated, as it will reveal confidential business information and strategies that Defendant employs with respect to issuance of its insurance policies."); *Ctr. for the Study of Servs. v. United States HHS*, 130 F. Supp. 3d 1, 4 (D.D.C. 2015) (involving case where insurer argued that U.S. Health and Human Services improperly disclosed health insurance plans it submitted for its bid in federally-facilitated market for health plans); *Biles v. HHS*, 931 F. Supp. 2d 211, 214 (D.D.C. 2013) (involving private insurance companies offering health insurance coverage to Medicare beneficiaries). In contrast, the insurance-related documents at issue here would not provide Hecla's competitors—other mining companies—with "valuable insights into the company's operations" or "give competitors pricing advantages over the company." *People for the Ethical Treatment of Animals*, 2005 U.S. Dist. LEXIS 10586, at *19-20 (citing *National Parks II*, 547 F.2d at 684).

Therefore, I find that Hecla has failed to establish that competitive harm could result from disclosure of the documents in Category 3.


CONCLUSION

For the reasons stated above, I find that all the information claimed as confidential in Categories 2 and 3 is not a trade secret or CBI and, therefore, is not within the scope of Exemption 4 of the FOIA. Pursuant to EPA's regulations at 40 C.F.R. § 2.205(f), this constitutes the final EPA determination concerning your business confidentiality claim. The determination constitutes final agency action concerning the

described business confidentiality claim and may be subject to judicial review under Chapter 7 of Title 5, United States Code. In addition, EPA may make the information publicly available on or after the tenth working day after the date of your receipt of this notice, unless the EPA Office of Regional Counsel has first been notified of your commencement of an action in Federal court (1) to obtain judicial review of this determination and (2) to obtain preliminary injunctive relief against disclosure. Even if you have commenced an action in federal court, EPA may make this information available to the public if the court refuses to issue a preliminary injunction or upholds this determination. EPA may also make this information available to the public, after reasonable notice to you, if it appears to the Agency that you are not taking appropriate measures to obtain a speedy resolution of the action.

If you have any questions about this matter, please call Mai Denawa, Assistant Regional Counsel, at 303-312-6514.

Sincerely,

A handwritten signature in dark ink, appearing to read "K C Schefski".

Kenneth C. Schefski
Regional Counsel

Enclosures

1. 2015 Hecla Substantiation Letter
2. 2018 U.S. EPA Category 1 Determination Letter
3. Hecla September 4, 2018 Letter
4. Document Description

cc: [Erin Agee, Legal Enforcement Program]